WONG WAI KEONG v. PP

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
ROHANA YUSUF JCA
ZAKARIA SAM JCA
[CRIMINAL APPEAL NO: B-05-258-10-2012]
21 AUGUST 2014

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in cannabis – Identification evidence of drugs exhibits – Whether challenged – Whether break in chain of evidence proven – Whether there was doubt as to identity of drug exhibits – Whether mens rea possession established – Whether trial judge correctly invoked presumption of trafficking under s. 37(da) – Whether presumption rebutted – Whether conviction safe*

EVIDENCE: *Exhibits – Identity of exhibits – Whether drugs exhibits unmistakably identified – Whether identification evidence of drugs exhibits challenged – Whether there was break in chain of evidence – Whether there were doubts as to identities of drugs*

The appellant was charged and tried on two charges of trafficking in cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') punishable under s. 39B(2) of the same Act. The first charge involved 208g of cannabis found in a plastic bag the appellant was holding at the time of his arrest, whilst the second charge concerned 266g of cannabis found in the car driven by the appellant. At the end of the trial, the High Court Judge found the appellant guilty of both charges, convicted him of the charges and sentenced him to mandatory death sentence. Hence, the appeal by the appellant. The appellant raised three principal grounds in support of his appeal: (i) there were doubts as to the identities of the drugs exhibit and the doubt was never explained or clarified by the prosecution; (ii) the prosecution failed to call the owner of the car or to tender the s. 112 of the Criminal Procedure Code statement of the car owner; and (iii) the High Court Judge erred when he failed to rule whether the trafficking presumption invoked by him under s. 37(da) of the DDA had been rebutted by the appellant.

Held (dismissing appeal; affirming conviction and sentence)
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) The witnesses had unmistakably identified the drugs exhibits during the trial through the markings, including the date and the signatures placed on them. Their identification evidence of the drugs exhibits tendered during the trial was not seriously challenged. Having regard to the evidence, the drugs exhibits seized from the appellant and handed to the investigating officer were the same drugs that were examined and analysed by the chemist and eventually produced during trial in the High

A Court. There was no break in the chain of evidence that could have created a reasonable doubt as to the identity of the drug exhibits. (para 10)

(2) The owner of the car did not belong to the class of witnesses who is 'essential to the unfolding of the narratives on which the prosecution is
B based' and was thus, not an important and material witness to unfold the case of prosecution in the right perspective. Therefore, the issue of ownership of the car was irrelevant. The real and critical issue for determination was whether the appellant had possession of the drugs found in the plastic bag on the floor mat of the driver's seat below the
C steering. Based on proximity of the appellant to the drugs found in the plastic bag and the surrounding facts, the only inference that could be made was that he had the *mens rea* possession of the cannabis. As such, the High Court Judge did not err when he invoked the presumption of trafficking under s. 37(da) of the DDA and it followed that the
D prosecution had proved a *prima facie* case against the appellant. (paras 13 & 14)

(3) The statutory presumption of trafficking under s. 37(da) is a rebuttable presumption. Although the High Court Judge had failed to consider whether the presumption that he invoked had been rebutted on a balance
E of probabilities at the end of the whole case, there were exceptional circumstances in the present case to invoke the proviso to s. 60(1) of the Courts of Judicature Act 1964. The appellant was apprehended while in the possession of cannabis weighing 474g in total, an amount that was much larger than what was likely to be used for his own consumption.
F In the absence of contradiction or in the absence of any credible explanation, this fact was sufficient to lead to a strong inference that the purpose for which the appellant was in possession of the drugs he was carrying was to transfer the possession of the offending drugs to another party. (para 17)

G **(4)** Further, it was never suggested in the appellant's defence that the cannabis were for his own consumption. In absence of such defence, the court was satisfied that, had the High Court Judge properly directed himself by considering at the end of the whole case whether the presumption that he invoked had been rebutted on a balance of
H probabilities, he would nonetheless have come to the same finding that the appellant had failed to rebut the trafficking presumption. Therefore, the conviction of the appellant was safe. (para 17)

***Bahasa Malaysia** Translation*

I Perayu dipertuduh dan dibicarakan atas dua pertuduhan pengedaran kanabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum di bawah s. 39B(2) Akta yang sama. Pertuduhan pertama melibatkan 208g kanabis ditemui dalam sebuah beg plastik yang dipegang

oleh perayu semasa ditangkap manakala pertuduhan kedua melibatkan 266g kanabis ditemui dalam kereta yang dipandu oleh perayu. Di akhir perbicaraan, Hakim Mahkamah Tinggi mendapati perayu bersalah atas kedua-dua pertuduhan, menyabitkan perayu ke atas pertuduhan-pertuduhan tersebut dan menjatuhkan hukuman mati mandatori. Oleh itu, rayuan perayu. Perayu membangkitkan tiga alasan utama untuk menyokong rayuannya: (i) terdapat keraguan mengenai identiti ekshibit dadah dan keraguan tersebut tidak pernah diterangkan atau dijelaskan oleh pihak pendakwaan; (ii) kegagalan pihak pendakwaan memanggil pemilik kereta atau mengemukakan kenyataan s. 112 Kanun Tatacara Jenayah pemilik kereta tersebut; dan (iii) Hakim Mahkamah Tinggi terkhilaf apabila beliau gagal memerintahkan sama ada anggapan pengedaran yang dibangkitkannya di bawah s. 37(da) ADB telah disangkal oleh perayu.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Azahar Mohamad HMR menyampaikan penghakiman mahkamah:

(1) Saksi-saksi tanpa ragu telah mengenal pasti ekshibit-ekshibit dadah semasa perbicaraan melalui tanda-tanda yang diletakkan pada ekshibit-ekshibit tersebut termasuk tarikh dan tandatangan. Keterangan pengenalpastian ekshibit-ekshibit dadah yang dikemukakan semasa perbicaraan tidak dicabar secara serius. Mengambil kira keterangan itu, ekshibit-ekshibit dadah yang dirampas daripada perayu dan diserahkan kepada pegawai penyiasat adalah dadah sama yang diperiksa dan dianalisis oleh ahli kimia dan seterusnya dikemukakan semasa perbicaraan di Mahkamah Tinggi. Tiada pemutusan dalam rantaian keterangan yang boleh mewujudkan keraguan munasabah mengenai identiti ekshibit-ekshibit dadah tersebut.

(2) Pemilik kereta tidak tergolong dalam kelas saksi-saksi yang 'essential to the unfolding of the narratives on which the prosecution is based' dan justeru, bukan saksi penting dan utama untuk merungkai kes pendakwaan dalam perspektif yang betul. Lantaran itu, isu pemilikan kereta tidak relevan. Isu sebenar dan kritikal untuk penentuan adalah sama ada perayu mempunyai milikan dadah yang ditemui dalam beg plastik di atas alas tempat letak kaki pemandu di bawah stereng. Berdasarkan kedekatan perayu dengan dadah yang ditemui dalam beg plastik dan fakta-fakta sekeliling, satu-satunya inferens yang boleh dibuat adalah bahawa dia mempunyai *mens rea* milikan kanabis. Oleh itu, Hakim Mahkamah Tinggi tidak terkhilaf apabila beliau mengguna pakai anggapan pengedaran di bawah s. 37(da) ADB dan ia mengikuti bahawa pihak pendakwaan berjaya membuktikan kes *prima facie* terhadap perayu.

(3) Anggapan statutori pengedaran di bawah s. 37(da) adalah anggapan yang boleh dipatahkan. Walaupun Hakim Mahkamah Tinggi gagal mengambil kira sama ada anggapan yang beliau guna pakai telah disangkal atas imbangan kebarangkalian pada akhir keseluruhan kes,

terdapat hal keadaan yang istimewa dalam kes ini untuk mengguna pakai proviso s. 60(1) Akta Mahkamah Kehakiman 1964. Perayu ditahan semasa dalam milikan kanabis sejumlah 474g, jumlah yang lebih besar daripada yang mungkin untuk kegunaan sendirinya. Tanpa percanggahan atau apa-apa penjelasan yang boleh dipercayai, fakta ini mencukupi untuk membawa kepada inferens kukuh bahawa tujuan perayu memiliki dadah yang dibawanya adalah untuk memindahkan milikan dadah kepada pihak lain.

(4) Selain itu, tidak pernah disarankan dalam pembelaan perayu bahawa kanabis tersebut ialah untuk kegunaannya sendiri. Tanpa pembelaan sedemikian, mahkamah berpuas hati bahawa sekiranya Hakim Mahkamah Tinggi mengarahkan dirinya secara betul dengan mempertimbangkan di akhir keseluruhan kes sama ada anggapan yang beliau guna pakai telah disangkal atas imbangan kebarangkalian, beliau akan tetap mencapai keputusan yang sama bahawa perayu telah gagal untuk menyangkal anggapan pengedaran. Dengan itu, sabitan perayu adalah selamat.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(dist)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Ong Ah Chuan & Koh Kai Chaeng v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Ku Yahya Ku Bahari & Anor [2002] 1 CLJ 113 CA ***(refd)***
PP v. Letchumanan Suppiah [2006] 1 CLJ 557 CA ***(refd)***
Seneviratne v. R [1936] 3 All ER 36 ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Dangerous Drugs Act 1952, ss. 2, 6, 37(da), 39A(2), 39B(1)(a), (2)
Penal Code, s. 34

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Awang Armadajaya; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-204 & 205-2011 (affirmed)]

Reported by S Barathi

JUDGMENT

Azahar Mohamed JCA:

[1] In the High Court, Wong Wai Keong ("the appellant") was charged and tried on two charges of trafficking in cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA") punishable under s. 39B(2) of the same Act.

[2] The first charge involving 208g of cannabis relates to the drugs found in a plastic bag the appellant was holding at the time of his arrest. The charge reads:

> Bahawa kamu pada 22 Oktober 2010, jam lebih kurang 04.00 petang di hadapan rumah No. 16 BM 1/7 Jalan Bukit Mayang, Kelana Jaya, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu Cannabis sejumlah 208 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta Dadah Berbahaya 1952.

[3] The second charge concerned 266g of the cannabis, which were found in the car driven by the appellant. The charge reads:

> Bahawa kamu pada 22 Oktober 2010, jam lebih kurang 04.00 petang di dalam kereta jenis Toyota Vios bernombor pendaftaran BHC 3831 di hadapan rumah No. 16 BM 1/7 Jalan Bukit Mayang, Taman Mayang, Kelana Jaya, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya Cannabis sejumlah 266 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1) (a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta Dadah Berbahaya 1952.

[4] At the end of the trial, the learned High Court Judge found the appellant guilty of both the charges, convicted him of the charges and sentenced him to mandatory death sentence. Hence, the appeal by the appellant against the decision of the learned High Court Judge. We heard his appeal, wherein at its conclusion we unanimously dismissed it. We now give our reasons.

[5] In brief, the prosecution evidence is as follows. Based on information received, ASP Mohd Sahar bin Mohd Yunus ("PW3") and his raiding team had taken up ambush positions and carried out surveillance at the vicinity of Jalan BM 1/7, Jalan Bukit Mayang, Taman Mayang, Kelana Jaya, Petaling Jaya. They were specifically on the lookout for the target car, a Toyota Vios, bearing registration No BHC 3831 ("the car"). As the facts unfolded, while PW3 and his raiding team was keeping watch, the car was seen entering the ambushed area and parked outside house No. 16, Jalan BM I/7. The appellant was the driver. He was alone in the car. The car was then blocked. PW3 identified himself and at the same time he saw the appellant was holding with his two hands a purple plastic bag. PW3 observed that the appellant had a disability with his right hand. The plastic bag was seized and on inspection, it had a black plastic bag. Inside the black plastic bag was an aluminium foil which contained a compressed block of vegetable material suspected to be cannabis. This formed the subject matter of the first charge. In this regard, the material part of the evidence of PW3 is as follows:

> Kemudian saya keluar daripada kereta dan menghampiri kereta tersebut. Masa itu saya lihat 1 lelaki Cina dalam kereta tersebut cuba keluar daripada kereta. Masa itu kaki kanan dia sudah di luar, pintu kereta telah

dibuka. Masa itu saya telah tahan dia. Saya telah perkenalkan diri sebagai polis. Saya tunjukkan kad kuasa saya, saya telah memegang bahu lelaki ini.

Lelaki ini cuba keluar cepat daripada kereta. Masa itu saya berada berhadapan dengannya. Saya melihat suspek memegang plastik warna ungu dengan cara mengapit antara 2 tangan dia. Saya telah rampas plastik ungu tersebut. Lepas itu baru saya tahu lelaki ini cacat pada tangan kanan dia.

Sepanjang masa ini, suspek seorang sahaja dalam kereta. Saya kemudian buka plastik dan saya dapati bau dadah ganja itu dengan kuat.

[6] A search was then made in respect of the car. PW3 found a black plastic bag on the floor mat of the driver's seat below the steering. Inside the plastic bag was a compressed slab which was wrapped with a transparent plastic and an aluminium foil. The compressed slab was suspected to be cannabis. This formed the subject matter of the second charge. PW3 said there was also a strong smell of cannabis from the plastic bag.

[7] The two compressed slabs were subsequently sent to the chemistry department for chemical examination and analysis. They were later confirmed by the chemist, Maimonah binti Sulaiman ("PW2") to be cannabis as defined in s. 2 of the DDA weighing in total 208g for the first charge and 266g for the second charge.

[8] On being called to make his defence, the appellant elected to give evidence under oath. The substance of his evidence is well summarised by the learned High Court Judge in his judgment as follows:

(a) Sebelum ditangkap, "T" bekerja dengan seorang kawannya bernama David Ho (David) yang baru berumur 20 tahun. Menurut "T", David bekerja sebagai penjual ubat dan menjual DVD.

(b) "T" berkata beliau bekerja dengan David untuk menghantar ubat kepada pelanggan-pelanggan David. Setiap kali penghantaran David akan membayar RM150 sebagai upah. Menurut "T" lagi beliau baru bekerja dengan David selama 1 bulan.

(c) Menurut "T" lagi, setiap kali penghantaran hendak dibuat, David akan menelefon beliau dan barang-barang yang akan dihantar telah diletakkan oleh David di dalam keretanya. "T" hanya akan memandu sahaja kereta tersebut ke alamat yang diberikan oleh David. Apabila sampai ke destinasi pelanggan, "T" akan menelefon David dengan menggunakan satu nombor telefon yang diberikan oleh David kepadanya, iaitu 016-2002210. David akan menelefon pelanggan itu untuk mengambil barang yang dipesan daripada "T".

(d) Pada hari kejadian, "T" telah menerima panggilan daripada David lebih kurang jam 11.00 pagi untuk menghantar barang kepada pelanggan di No. 16 Kelana Jaya, Petaling Jaya. Barang-barang untuk dihantar telah diletakkan di dalam kereta Vios, nombor pendaftaran 3831. David memberitahu "T" itu adalah ubat tradisional.

(e) Menurut "T" barang tersebut telah diletakkan di tepi tempat duduk pemandu, dan satu barang lagi beliau tidak tahu diletak di mana di dalam kereta tersebut. David juga telah memesan kepada "T" supaya jangan membuka bungkusan itu.

(f) "T" sampai di alamat tersebut jam 3.00 petang lebih, "T" telah menelefon David, pada masa beliau sedang bercakap dengan David, datang 2 orang Melayu dan memperkenalkan diri sebagai polis, mereka kemudian menangkap "T". Menurut "T" pada masa itu beliau masih berada di dalam kereta dan barang masih berada di tempat duduk kiri pemandu. "T" berkata pada masa itu beliau rasa terkejut dan takut sedikit tetapi beliau tidak cuba melarikan diri.

(g) "T" mengatakan semasa di dalam kereta dia ada menghidu bau yang tidak menyenangkan, tetapi "T" berkata dia ingat itu bau keluar daripada alat penghawa dingin kereta yang rosak, tetapi "T" tidak memberitahu perkara itu kepada David.

(h) Selepas ditahan menurut "T", polis telah memeriksa kereta yang dia pandu dan menjumpai 2 bungkusan.

(i) "T" turut menafikan pada masa ditahan beliau sedang memegang bungkusan yang berisi Cannabis tersebut, ini kerana tangan kanan beliau telah cacat.

[9] Before us, learned counsel for the appellant had raised three principal grounds in support of this appeal.

[10] First, it was submitted that there were doubts as to the identities of the drugs exhibits. It was argued that there was doubt as to the total number of 'ketulan' seized and there was no clarity of evidence whether there were two or three 'ketulan'. According to learned counsel, this doubt was never explained or clarified by the prosecution and on this ground alone the convictions ought to be set aside. In deciding this issue, we noted that PW3, the investigating officer ("PW6") and PW2 had unmistakably identified the drugs exhibits while giving their evidence during the trial. They had identified the relevant exhibits through the markings, including the date and the signatures placed on them. Their identification evidence of the drugs exhibits tendered during the trial was not seriously challenged. The evidence as contained in the appeal records patently showed that there was no break in the chain of evidence regarding the impugned drugs exhibits. Having regard to the evidence, we were not in doubt that the drugs exhibits seized from the appellant by PW3 and handed to PW6 were the same drugs that were examined and analysed by PW2 and eventually produced during the trial in the High Court. There was no break in the chain of evidence that could have created a reasonable doubt as to the identity of the drugs exhibits (see: *Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945 and *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551; [2004] 6 AMR 189).

[11] We turn next to the second ground raised by learned counsel. It was submitted that the prosecution failed to call the owner of the car or to tender the s. 112 statement of the car owner. According to the PW6, the owner was

A one Yeap Beow Li. Learned counsel argued that the failure and omission to call the car owner or tender the s. 112 statement has created a gap in the prosecution's case. The appellant relied on the case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113. In that case, the police acting on a tip-off apprehended the first and second accused ('both accused') at a road block
B during the inspection of a vehicle driven by the first accused. It was subsequently discovered that the back seat rest of the vehicle contained 40 transparent plastic packages of cannabis. Both accused were then tried, convicted and sentenced to death under s. 39B(1) of the DDA for trafficking in 38,499.68g of cannabis. Their appeal before the Court of Appeal was
C heard and subsequently dismissed. They then appealed to the Federal Court. The Federal Court allowed the appeal and set aside the conviction and the sentence of the court below and substituted it with one of possessions under s. 6 of the DDA and punishable under s. 39A(2) of the same Act read with s. 34 of the Penal Code. Both the accused were sentenced to 20 years imprisonment from the date of arrest plus the mandatory ten strokes of
D whipping.

[12] We should point out that the case of *Ibrahim Mohamad v. PP* relied on by learned counsel is distinguishable on its facts. There, the drugs in question were discovered at the back seat rest of the car and that the first accused was
E the driver of the vehicle and the second accused was the passenger at that material time. In our present case, the appellant was the driver and he was alone in the car. Even more to the point, the plastic bag, which emitted a strong smell of cannabis was placed in the plain view of the appellant.

[13] Looking at the surrounding facts above, in our judgment, the issue of
F ownership of the car was an irrelevant one (see: *PP v. Letchumanan Suppiah* [2006] 1 CLJ 557). The owner of the car did not belong to the class of witnesses described by Lord Roche in *Seneviratne v. R* [1936] 3 All ER 36) as "essential to the unfolding of the narratives on which the prosecution is based". It is clear on the factual matrix of the instant case, the owner of the
G car was not an important and material witness to unfold the case of prosecution in the right perspective.

[14] The real and critical issue for determination is whether the appellant had possession of the drugs found in the plastic bag on the floor mat of the driver's seat below the steering. In our judgment, based on proximity of the
H appellant to the drugs found in the plastic bag and the surrounding facts, the only inference that could be made was that he had the *mens rea* possession of the cannabis. As such, the learned High Court Judge did not err when he invoked the presumption of trafficking under s. 37(da) DDA and it followed that the prosecution had proved a *prima facie* case against the appellant.

I **[15]** Finally, there remains to be considered the submission of learned counsel for the appellant that the learned High Court Judge erred when he failed to rule whether the trafficking presumption invoked by him under

s. 37(da) of the DDA had been rebutted by the appellant. In this way, learned counsel argued that there was a serious non-direction which amounted to a misdirection by the learned trial judge warranting appellate intervention.

[16] The statutory presumption of trafficking under s. 37(da) is a rebuttable presumption. Therefore, it is incumbent on the learned High Court Judge to consider at the end of the whole case whether the presumption that he invoked had been rebutted on a balance of probabilities (see: *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705, *Tan Boon Kean v. PP* [1995] 4 CLJ 456 and *PP v. Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113). A reading of the judgment of the learned High Court shows that he had failed to direct his mind on this point. In this regard, the learned Deputy Public Prosecutor urged us to apply the proviso to s. 60(1) of the Courts of Judicature Act 1964:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[17] In our judgment, there were exceptional circumstances in the present case for us to invoke the proviso. First, it has to be noted that there were two charges against the appellant. The first relates to the cannabis in the plastic bag carried by him whilst the second relates to the cannabis found in the car. The impugned drugs were in the form of compressed slabs. The appellant was apprehended while in the possession of cannabis weighing 474g in total. This amount was much larger than what was likely to be used for his own consumption. In the absence of contradiction or in the absence of any credible explanation, in our judgment, this fact was sufficient to lead to a strong inference that the purpose for which the appellant was in possession of the drugs he was carrying was to transfer the possession of the offending drug to another party (see: *Ong Ah Chuan & Koh Chai Cheng v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64 and *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65; [2003] 2 MLJ 241). In any event, it was never suggested in the appellant's defence that the cannabis were for his own consumption. In absence of such defence, we were satisfied that, had the learned High Court Judge properly directed himself by considering at the end of the whole case whether the presumption that he invoked had been rebutted on a balance of probabilities, he would nonetheless have come to the same finding that the appellant had failed to rebut the trafficking presumption.

[18] For all these reasons, we found no merits in this appeal. We found the conviction of the appellant safe. We had, therefore, dismissed the appeal. We affirmed the conviction and the sentence of death imposed by the learned High Court Judge upon the appellant.